Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JOSEPH A. CONNOLLY, III,
Petitioner,

v.

Entex Information Services, Inc.,
Respondent.

On a Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

This case arises under the Americans with Disabilities Act ("ADA") and Oregon's statutes prohibiting discrimination against people with disabilities ("Oregon's Statutes"). The case presents the following questions regarding proof of claims under the ADA:

1. In a disability discrimination case brought under the ADA, does a mentally disabled plaintiff create a triable issue of fact defeating summary judgment through evidence that satisfies the test this Court set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000)?

2. In a disability discrimination case brought under the ADA, does a mentally disabled plaintiff's proof that his employer failed to engage in an 'interactive process' to arrive at a reasonable accommodation, as required by 29 C.F.R. 1630.1(o)(3), create a triable issue of fact sufficient to defeat a summary judgment motion?

Under Oregon's Statutes, this case presents the following question:

3. Should the Ninth Circuit have followed the precedent of Oregon's Supreme Court to determine whether the evidence submitted was sufficient to withstand summary judgment to the claims brought under Oregon's Statutes?

PARTIES TO THE PROCEEDING

The caption to the case contains the names of all the parties to this proceeding.

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IN THE SUPREME COURT OF THE UNITED STATES

JOSEPH A. CONNOLLY, III, *Petitioner*

v.

ENTEX INFORMATION SERVICES, INC.,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Joseph A. Connolly, III, respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS AND ORDERS ENTERED IN THIS CASE

The United States District Court for the District of Oregon entered an Opinion and an Order on May 19, 2000, granting defendant's summary judgment motion against plaintiff's complaint. Copies of that Opinion and Order are included in the Appendix. The Ninth Circuit Court of Appeals entered a Decree of the Court and a Memorandum opinion on December 13, 2001, affirming the District Court. The Memorandum was not reported. Copies of that Decree and Memorandum are included in the Appendix.

The Ninth Circuit also denied plaintiff's Petition for Rehearing En Banc by Order dated January 31, 2002, a copy of which is included in the Appendix.

BASIS FOR JURISDICTION OF SUPREME COURT

The Decree of the Ninth Circuit was entered on December 13, 2001. The Order denying plaintiff's Petition for Rehearing En Banc was entered on January 31, 2002. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1254 (1).

RULES AND STATUTES INVOLVED IN CASE

The Americans with Disabilities Act ("ADA") is found at 42 U.S.C. § 12101 et seq. Relevant portions of the ADA are included in the Appendix. Oregon's Statutes prohibiting discrimination against individuals with disabilities are found at O.R.S. 659.400 et seq. Relevant portions of Oregon's Statutes are included in the Appendix.

STATEMENT OF CASE

Facts Relevant to Petition

Petitioner Connolly went to work for Respondent Entex Information Services, Inc. ("Entex") on September 28, 1996 in Entex's Intel Division. Entex hired Connolly subject to a 120-day probationary period which he successfully completed in January of 1997. Before he went to work at Entex, Connolly successfully completed a tour of duty with the United States Navy. He had also succeeded at computer jobs, including receiving a commendation from one employer for his abilities.

Connolly started out in Entex's "WinWin" team, upgrading programs on Intel's computers. All of the positions on the WinWin team were temporary so that Connolly eventually had to transfer to another job at Entex. After completing his probationary period, Connolly requested a transfer to a Desktop Support position, repairing computer problems and assisting Intel users. Connolly was in good standing with Entex at this time, and when he transferred, managers of the Desktop Support program interviewed him, discussed his technical knowledge with him, and determined he was qualified for the new job.

Connolly is a mentally disabled person. His disabilities include Attention Deficit Disorder ("ADD"), Attention Deficit with Hyperactivity Disorder ("ADHD"), depression, and Asperger's Syndrome, a form of autism. When Connolly first went to work at Entex, Connolly filled out an Entex form, indicating that he was a person with a disability. Connolly wanted to alert Entex that he was disabled and might need accommodation. The purpose of that form is so that Entex can consider individuals under its Affirmative Action Program. Connolly was never considered for that program. Despite his disabilities, Connolly had been meeting Entex's expectations until he transferred to Desktop Support. Entex did not discuss with Connolly the fact that he was disabled when he applied for the Desktop Support position nor did Entex discuss with Connolly whether the Desktop Support position was appropriate for someone with his disabilities. If they had, Connolly would have explained the nature of his disabilities. On reflection, Entex management has conceded that they probably would not have hired Connolly if they had known of his disabilities.

In February of 1997, about one month after Connolly

transferred into Desktop Support, the subject of closing a specific number of "tickets" came up for the first time. At that time the subject was presented as a motivational or aspirational goal of twenty tickets per week. In early April Connolly's Campus Manager told Connolly that he was not closing twenty tickets a week – the "expected number". His managers told him his work was good but that he needed to close more tickets. At that time, Connolly told his managers that he was disabled and needed accommodation. They agreed to meet with him weekly to discuss how he was doing. They did not follow through with that agreement.

In that same month Connolly requested a transfer to open positions which did not have a ticket count. His managers refused even to consider a transfer. Instead, Entex chose to deal with Connolly in the disciplinary system. Entex management testified that Connolly could not be considered for a transfer since Entex had identified him as having performance problems.

During the next months until Connolly was terminated, he was considered for only one transfer, back to the WinWin team. There were two problems with the proposed transfer. First, the transfer was to a group different than Connolly had worked with originally and where he had been successful. After he consulted with the supervisor of that group, Connolly determined that the job would not be suitable for his disabilities, and advised Entex management of that decision. The job was not installation or repair of computers. The job was primarily gathering information. Second, all the WinWin jobs were temporary, and, in fact, ended within months of the proposed transfer.

From the time Connolly was put into discipline until he was fired, his performance came under intense scrutiny

in every way. Rather than encouraging the communication process Connolly had requested, Entex began looking for a way to terminate him. Entex management referred how to handle Connolly to human resources with the comment, "We squashed his request for a transfer so far right now." The response was to hold Connolly accountable for the requirements of the job and

> document when he doesn't meet those requirements. Manage up or manage out. Since he has not suggested any specific accommodation, there seems to be nothing we can give consideration to change.

One of Connolly's co-workers was assigned to monitor Connolly's activities surreptitiously, something that had not been done with any other employee.

About the same time, Connolly learned his Manager was being replaced. He asked three times for an opportunity to discuss with the new Manager his disabilities and how they might be accommodated so that he could meet the standard he was told everyone else was meeting. The new Manager did not respond to Connolly's requests. Instead, the first time Connolly met the new Manager was when he was called to the Manager's office on June 24, 1997 and given a Letter of Concern Regarding Your Performance. The Letter documented six asserted problem areas, including the failure to close twenty tickets a week. He was told that if he did not correct the problem areas he would be disciplined "up to and including termination."

Connolly contacted his Human Resources representative and asked for a meeting to see how he could deal with these problem areas, in light of the fact

that his communications with Entex management were becoming very threatening to him. The Human Resources representative forwarded his request to Entex management and responded that he should follow the recommendations in the Letter of Concern. Connolly next sent his managers information about the ADA and ADD. No one discussed the information with Connolly.

On July 21, 1997 Connolly presented an Intensive Task Recovery Plan which set forth an eight-week process to try to achieve the ticket closing requirement. The cornerstones of Connolly's Plan were repetition and weekly meetings with management with positive and negative input. Entex responded on July 25, 1997 with a Final Written Warning and a modified version of the Plan, reducing the time period to four weeks and leaving little room for repetition. In addition to the Plan which Entex proposed, Entex offered Connolly only the following items: a "checklist" and binder to use to take notes and track data; a reduction in the number of tickets given to Connolly at one time from four or five to one or two; and instruction in the use of software to make a report.

The so-called requirement that Connolly close twenty tickets a week became a hard and fast rule that Connolly was never able to achieve. However, what Entex managers did not tell Connolly was that while they were holding him to this inflexible standard, that standard did not apply to other employees, none of whom were disabled. For his part, Connolly did not know how many tickets his co-workers were closing. When that information became available in discovery, it appeared that virtually no technician closed twenty tickets a week throughout the relevant time period. During the calendar year of 1997, there were 274 technicians working at Entex. Only four of those 274 technicians closed an average of

twenty tickets per week for the entire year, and 169 technicians closed fewer tickets than Connolly.

During July and August of 1997, there were eight technicians in Connolly's work group, including Connolly, who were supposedly subject to the twenty ticket requirement. None of those technicians closed an average of twenty tickets per week. One technician closed between eighteen and twenty tickets per week. Every other technician closed fewer than twelve tickets per week. According to Connolly's testimony, none of these technicians was fired. Furthermore, according to documents which Entex produced, there were not even sufficient tickets available for the technicians in Connolly's work group to close twenty per person per week.

At summary judgment, Entex disputed all these facts through affidavits of its management, maintaining that "certain" people were subject to the ticket closing requirement and that other technicians were disciplined for failing to close sufficient tickets. However, Entex was unable to explain who was subject to the "requirement" and who was not. Furthermore, the evidence which Entex provided by affidavit was contrary to deposition testimony that everyone at the job site had production requirements of eighteen to twenty tickets per week. The evidence was also contrary to the deposition testimony of Connolly's lead that Connolly was the only person put on discipline and was the only person management said was not pulling his weight.

As to the qualitative issues which Entex documented, Connolly disputed many of the specifics of alleged missed work or missed meetings. Furthermore, Connolly's management agreed that Connolly received no complaints from customers about his work even though all

other technicians generated complaints from time to time. Furthermore, Connolly presented evidence from his therapist that Connolly's performance during the summer of 1997 did not demonstrate what Connolly was capable of doing because the pressure to which he was being subjected was causing him to sink into depression and into a worsening emotional condition.

The harder Connolly tried to obtain accommodation so that he could meet Entex' "requirements," the more difficult his work environment became. He told his lead he had ADD. His lead's response was that ADD was "bullshit." On another occasion the lead told Connolly to get off his "high horse" or he would slap Connolly. Another employee testified that he considered Connolly lazy even though he acknowledged that laziness is a stereotype used for people with learning disabilities. Connolly's requests to meet were ignored for up to thirty days.

During this entire time, Connolly tried to find a way to propose his own accommodation. His therapist contacted Human Resources to propose accommodations which could have helped Connolly achieve the supposed "requirements" of his job, including performing a work site analysis and working with Connolly as a job coach. After his first conversation with Human Resources, the therapist's calls and letters were ignored.

On August 14, 1997, Entex fired Connolly.

Proceedings Below

Petitioner filed his Complaint, in propria persona, in the United States District Court for the District of Oregon on January 21, 1999, alleging two claims for relief against Entex Information Services, Inc., based on the ADA and on

Oregon's statutes prohibiting discrimination against disabled individuals. Entex filed its Answer and Affirmative Defenses on April 14, 1999, denying the substance of Connolly's claims and asserting a number of affirmative defenses. The only affirmative defenses at issue in this appeal are Entex's assertions that Connolly was not able to perform the essential functions of his position with or without reasonable accommodation, that all of Entex's actions were taken in good faith, and that all of Entex's actions were without malice, ill will or reckless indifference to Connolly.

Entex filed a Motion for Summary Judgment on December 16, 1999. The District Court granted that motion on May 19, 2000. The basis for the District Court's decision was:

> Because Connolly (1) has failed to identify any reasonable accommodation that would have allowed him to perform the essential functions of a Senior Customer Engineer in a Desktop Support position, and (2) opted not to take the reassignment to the WinWin position offered by Entex, he is not a qualified individual with a disability under the ADA or Oregon law and summary judgment is appropriate.

App. at p. 11a.

Connolly appealed the District Court's decision to the United States Court of Appeals for the Ninth Circuit on June 14, 2000. The Ninth Circuit entered an unpublished Memorandum and Decree affirming the District Court on December 13, 2001, reasoning:

> Connolly argues that Entex failed to provide reasonable accommodation because it failed to enter the interactive process with him, but Connolly does not show that Entex did not make a good faith effort to provide a reasonable accommodation.
>
> * * * * *
>
> Oregon Revised Statutes § 659.449 provides that Oregon law is to be construed consistently with the federal ADA. Since we have found that Entex did not violate the federal ADA, a similar finding follows as to Connolly's claims under the Oregon statute.

App. at pp. 18a, 19a.

The District Court had subject matter jurisdiction over plaintiff's federal claim pursuant to the ADA, 42 U.S.C. §12117 et seq. and pursuant to 28 U.S.C. §1331 and 42 U.S.C. §1983. The District Court had supplemental jurisdiction over plaintiff's state law claim pursuant to 28 U.S.C. §1367 (a).

DISCUSSION

1. A mentally disabled plaintiff seeking relief for intentional discrimination under the ADA should not be required to meet a more stringent standard of proof to defeat a motion for summary judgment than the standard imposed upon other victims of discrimination under *McDonnell Douglas Corp v Green*, 411 US 792 (1973) and *Reeves v Sanderson Plumbing Products,*

***Inc.*, 530 US 133 (2000).**

The ADA prohibits discrimination against individuals with disabilities as follows:

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. § 12112 (1).

Congress passed the ADA because Congress determined that "some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing . . ." 42 U.S.C. § 12101 (a) (1). One central purpose of the ADA is "to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities." 42 U.S.C. § 12101 (b)(2).

A "qualified individual with a disability" is defined as:

> an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. . . .

42 U.S.C. § 12111 (8). Reasonable accommodation, in relevant part, is defined as:

> job restructuring, part-time or modified work schedules, reassignment to a vacant position, . . . training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

This Court has never determined what are the prima facie elements of a claim under the ADA. However, the statue itself suggests that a claimant under the ADA must offer evidence:

- that the claimant is a qualified individual with a disability;

- that the claimant was able to perform the essential job functions of the claimant's employment, with or without accommodation; and

- that the claimant was discriminated against because of the claimant's disability.

This Court has articulated standards in its case law for proving discrimination claims in the context of race, age and gender, but this Court has not decided whether those standards apply in an ADA claim. In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), this Court considered the "order and allocation of proof in a private non-class action challenging employment discrimination" and noted the importance of the Fact Finder's job and the evidentiary problems for a claimant in a discrimination case. In that case, the plaintiff alleged that his employer had discriminated against him on the basis of his race. The

District Court dismissed his discrimination claims, and the Eighth Circuit reversed that decision.

This Court considered how to allocate the burden of proof and how that burden shifts upon a plaintiff's making a prima facie case:

> The complainant in a Title VII trial must carry the initial burden under the statue of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

Id. at 802. This Court determined that plaintiff had met his initial burden of proof, and noted, "The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection." *Id.* Finally, this Court said that the reason proffered by the employer should be examined:

> Petitioner's reason for rejection thus suffices to meet the prima facie case, but the inquiry must not end here. . . . On remand, respondent must . . . be afforded a fair opportunity to show that petitioner's stated reason for respondent's rejection was in fact pretext.

Id. at 804.

This Court examined the shifting burden of proof again in *United States Postal Service v. Aikens*, 460 U.S. 711 (1983), another case involving racial discrimination, and noted the importance of the fact finder's job and the difficulty for a claimant to prove discrimination:

> All courts have recognized that the question facing triers of fact in discrimination cases is both sensitive and difficult. The prohibitions against discrimination contained in the Civil Rights Act of 1964 reflect an important national policy. There will seldom be "eyewitness" testimony as to the employer's mental processes. But none of this means that the trial courts or reviewing courts should treat discrimination differently from other ultimate questions of fact.

Id. at 716. *Aikens*, as quoted above, suggests that the analysis set out in *McDonnell Douglas* should apply generally to cases of discrimination. Therefore, the requirements which a claimant under the ADA must meet should be no more or less stringent than those requirements in any other case, given the fact that much must be inferred from circumstantial evidence. This is particularly true since the ADA, unlike race and sex discrimination statutes, imposes an affirmative duty to provide reasonable accommodation to the disabled population, in addition to a duty not to discriminate against the disabled.

In *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), this Court expanded on the *McDonnell Douglas*

reasoning and held:

> The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus rejection of the defendant's proffered reasons, will *permit* the trier of fact to infer the ultimate fact of intentional discrimination.

Id. at 511 (racial discrimination)(italics in original). In that case, therefore, this Court allowed an inference of a discriminatory mental state from proof that the employer's proffered reason was a pretext.

Finally, in its most recent discussion of the order and allocation of proof in a discrimination case, this Court reaffirmed its decision that "it is permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation." *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000) (age discrimination):

> Thus, a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated.

Id. at 148. See also, *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981) (gender discrimination). In *Reeves*, this Court also stressed that in reviewing the record, "the court must draw all reasonable inferences in favor of the nonmoving party, and [the court]

may not make credibility determinations or weigh the evidence." *Reeves, supra*, at 150.

As this Court suggested in *Aikens*, the *McDonnell Douglas* allocation of burden of proof should apply to a claim brought under the ADA. However, unlike claimants in race, gender and age discrimination cases, a claimant in an ADA claim also has the right to reasonable accommodation under the ADA. 42 U.S.C. § 12112 (b)(5)(A). Therefore, in the context of summary judgment in an ADA claim, the following principles should apply:

- The claimant should have the burden of raising an issue of fact as to each element of the ADA claim, including raising facts as to whether the employee could have performed the job or another available job with or without reasonable accommodation;

- The burden should then shift to the employer to establish facts supporting a valid, non-discriminatory motive for the adverse employment action;

- The claimant should then have the opportunity to demonstrate that the employer's proffered reason is pretextual; and

- Evidence raising an issue of fact as to whether the employer's reason was pretextual should be sufficient to infer a discriminatory intent on the part of the employer.

In this case, neither the District Court nor the Ninth Circuit ever determined whether plaintiff's evidence was legally sufficient to state a prima facie case of discrimination under *McDonnell Douglas* nor whether plaintiff's evidence created an issue of fact on the issue of pretext. Had either the District Court or the Ninth Circuit applied the *McDonnell Douglas* test, plaintiff's evidence was plainly sufficient both to state a prima facie case of discrimination and to create an issue of fact as to pretext. Plaintiff's evidence was:

- Plaintiff suffers from ADD, depression and Ausberger's Syndrome. Defendant did not dispute that plaintiff's impairments are sufficient to make him a person with a disability under the ADA

- Plaintiff successfully performed the WinWin position, passed probation after 120 days and became a regular employee.

- Plaintiff's therapist gave expert testimony that plaintiff was capable of performing the Desk Top Support position with reasonable accommodation.

- Plaintiff offered both direct and circumstantial evidence of a discriminatory motive through evidence that (1) defendant terminated plaintiff for failing to satisfy a requirement of closing 20 tickets, where defendant did not enforce the same requirement against other similarly situated employees and there was insufficient work for plaintiff to satisfy the claimed requirement; (2) defendant failed to

implement its Affirmative Action Program for disabled persons; (3) defendant's supervisors ignored plaintiff's requests for meetings and failed to follow through with agreed upon meetings with plaintiff; (4) defendant's human resources managers referred to "squashing" plaintiff's request for one form of accommodation and (5) plaintiff's lead worker declared plaintiff's ADD to be "bullshit" and threatened to slap plaintiff around.

Under the *McDonnell Douglas* test, this evidence is plainly sufficient to create an issue of fact as to intentional discrimination. There is no reason that a mentally disabled plaintiff under the ADA should be subject to a more demanding summary judgment standard than other victims of discrimination, particularly in light of the fact that the ADA imposes an affirmative duty to reasonably accommodate the limitations imposed by plaintiff's mental disability. In this case, by ignoring the *McDonnell Douglas* test, both the District Court and the Ninth Circuit improperly assumed the role of a trier of disputed facts.

2. Plaintiff's evidence that defendant failed to initiate the interactive process required by 29 C.F.R 1630.1(o)(3) is sufficient to create a triable issue of fact in a claim brought under the ADA.

This Court has yet to provide guidance to the District and Circuit Courts concerning the ADA's duty to provide "reasonable accommodation." Significant questions exist as to how the parties determine what accommodation is "reasonable," how proof of reasonable accommodation fits into the standards enunciated in *McDonnell Douglas* and its

progeny, and as to whether the "reasonableness" inquiry is a question of law for the court or a question for fact for the jury .

In the instant case, the Ninth Circuit focused on reasonable accommodation in finding that "Connolly does not show that Entex did not make a good faith effort to provide a reasonable accommodation" and that "Entex was not required to give him the reassignment of his choice. . . . Entex satisfied its accommodation obligation by offering the WinWin position to Connolly." App. at p. 19a. Because the Ninth Circuit's decision focuses on the determination of only one issue, disregarding whether Connolly has put forth facts sufficient to establish a prima facie case, that decision is contrary to the standards which this Court has established in *McDonnell Douglas* and its progeny. In addition, the Ninth Circuit never considered how Entex's failure to enter into the interactive process fits into the *McDonnell Douglas* analysis.

Connolly has consistently argued that Entex was required to enter into an interactive process with him and that Entex's failure to do so was evidence of discrimination precluding summary judgment. The source of the interactive process is 29 C.F.R. 1630.1 (o)(3):

> To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.

Although this Court is not bound by regulations promulgated by the Equal Employment Opportunities Commission, this Court has found regulations promulgated under authority from Congress to be deserving of weight. See, e.g., *United States v. Mead*, 533 U.S. 218 (2001) (treasury regulations).

The circuits are split on whether an employer is required to enter into an interactive process with a disabled employee in order to satisfy the employer's burden of providing reasonable accommodation and what the effect is of such a failure. The positions taken by the various circuits fall generally into two categories although in some cases, the decisional law of the circuits is not internally consistent.

Some circuits take the position that the court should focus on determining whether the accommodation which was offered was reasonable. In that analysis, compliance with an interactive process is one fact among many which the court must consider in determining whether the claimant has satisfied the claimant's burden of producing evidence. Such an approach, however, has the effect of substituting the court's factual determination of reasonableness for the ultimate factfinder which is contrary to the direction this Court offered in *Aikens*.

An example of that approach is the First Circuit. That circuit has suggested that the need to engage in the interactive process is decided on a case by case basis. That circuit's position is summed up in *Kvorjak v. State of Maine*, 259 F.3d 48 (1st Cir. 2001). In that case, the First Circuit reviewed how other circuits had approached the "interactive process" and stated:

> Before delving into the substance of

> the accommodation issue, we address appellant's contention that the State violated the ADA by failing to utilize an informal, interactive process to make an individualized assessment of his needs and abilities. . . . Courts have construed the regulation as imposing various levels of obligation. . . . This court has not taken so categorical a stand on the interactive process, preferring instead to resolve the issue on a case-by-case basis.

Id. at 52. Therefore, the First Circuit rejected any notion that failure to enter into the interactive process was itself a violation of the ADA or even necessarily evidence of discrimination.

This same analysis is present in case law from the Eleventh and Seventh Circuits. See, *Willis v. Conopco, Inc.*, 108 F.3d 282, 285 (11th Cir. 1997) (plaintiff must demonstrate a reasonable accommodation regardless of defendant's investigation into potential accommodations); *Rehling v. City of Chicago*, 207 F.3d 1009, 1016 (7th Cir. 2000) (claimant's inability to point to available job as accommodation defeats claim, and defendants' failure to enter into interactive process does not of itself create liability).

However, the Seventh Circuit has been inconsistent in how it has approached reasonable accommodation claims. In *Bultemeyer v. Fort Wayne Community Schools*, 100 F.3d 1281 (7th Cir. 1996), the Seventh Circuit held that a case alleging discrimination for failure to provide reasonable accommodation did not even fall under the *McDonnell Douglas* analysis and that the employer's unwillingness to engage in the interactive process

precluded summary judgment in the employer's favor. In contrast to that decision is *Rehling, supra,* which put onto the claimant the burden of proving an available accommodation.

In *Bultemeyer*, also, the Seventh Circuit rejected the notion that the full burden to request reasonable accommodation fell on the employee, particularly where the disability was a psychological disability:

> But properly participating in the interactive process means that an employer cannot expect an employee to read its mind and know that he or she must specifically say "I want a reasonable accommodation," particularly where the employee has a mental illness.

Id. at 1285.

The notion that an employer's failure to enter into the interactive process may create liability by itself is at the heart of the decisions of a number of circuits. For example, in *Mengine v. Runyon*, 114 F.3d 415 (3rd Cir. 1997), the Third Circuit endorsed the notion that an employer has a duty to enter into the interactive process as part of providing reasonable accommodation. *Id.* at 420-21. In the summary judgment context, the Third Circuit has found that "where there is a genuine dispute about whether the employer acted in good faith [in the interactive process], summary judgment will typically be precluded." *Taylor v. Phoenixville School District*, 174 F.3d 142, 163 (3d Cir. 1999).

The Eighth Circuit sees the employer's failure to enter into the interactive process as evidence that the employer is acting in bad faith:

> We tend to agree with those courts that hold that there is no per se liability under the ADA if an employer fails to engage in an interactive process. . . . [T]he failure of an employer to engage in an interactive process to determine whether reasonable accommodations are possible is prima facie evidence that the employer may be acting in bad faith. Under these circumstances, we feel a factual question exists as to whether the employer has attempted to provide reasonable accommodation as required by the ADA.

Fjellestad v. Pizza Hut of America, Inc., 188 F.3d 944, 952 (8th Cir. 1999).

The Ninth Circuit recently appeared to join the Third and Eighth Circuits and even suggested that it would be more deferential to to the interactive process than those circuits:

> employers, who fail to engage in the interactive process in good faith, face liability for the remedies imposed by the statute if a reasonable accommodation would have been possible. We further hold that an employer cannot prevail at the summary judgment stage if there is a genuine dispute as to whether the employer engaged in good faith in the interactive process.

Barnett v. U.S. Air, Inc., 228 F.3d 1105, 1116 (9th Cir. 2000). Ironically, however, in the instant case, the Ninth Circuit focused not on whether plaintiff offered evidence that defendant failed to initiate the interactive process. Rather,

the court focused on whether Connolly identified specific accommodations, whether the court felt the accommodations Connolly identified were 'reasonable'; and, the court determined that offering Connolly a transfer of the employer's choosing was sufficient to avoid liability under the ADA and to allow summary judgment in favor of the employer, regardless of the Ninth Circuit's decision in *Barnett*. Therefore, the Ninth Circuit has also demonstrated inconsistency in its internal decisional law.

Some of the courts which reject liability for failure to enter into the interactive process focus on the language in 29 C.F.R. 1630.1 (o)(3) which states that "it may be necessary" to enter into the interactive process as an indication that the interactive process is permissive rather than mandatory. However, reading the regulation so narrowly undermines the purpose of the ADA to provide "clear, enforceable standards" to address the issue of discrimination against the disabled. Furthermore, treating the interactive process as a suggestion rather than a requirement has the effect of placing an often-times impossible burden on a claimant under the ADA. Since ADA cases invariably arise where the employee has not succeeded and has not received the accommodation which the employee wanted, the employee will be in the position of having to demonstrate that there was an accommodation which would have worked without ever actually having received that accommodation and without going through a process even to identify such an accommodation.

Connolly agrees that there are probably many situations in which what is a reasonable accommodation should be clear or where the employee has made the determination of what is reasonable accommodation and did not desire an interactive process. In those cases, the

employee could not insist on the interactive process. However, in many cases, such as the instant case, where the employee requests the interactive process, requiring the employer to engage in the interactive process will relieve the courts of having to determine whether the accommodations suggested by the employer or the employee are truly "reasonable." Courts will only have to determine whether the parties entered into the interactive process in good faith.

In the context of a summary judgment motion, the imposition of a requirement that the parties engage in the interactive process also conforms with the standards set out in this Court's cases. Since Entex stipulated for the purposes of the summary judgment motion that Connolly was disabled, applying the *McDonnell Douglas* analysis, Connolly had to raise issues of fact as to whether he was a qualified individual capable of performing his job, or another job, with or without accommodation, and whether he was discriminated against by Entex. Connolly satisfied his burden on the first element by presenting evidence that the he successfully performed the WinWin job, passed a probationary period of 120 days and became a regular employee, by presenting expert testimony that he was capable of performing the Desk Top Support position with reasonable accommodation, by presenting accommodations, including potential job transfers for which he was not considered, allowing his therapist to act as a job coach, and by demonstrating that he asked for accommodation including the interactive process and defendant failed to respond. He satisfied his burden as to the second element by producing evidence that Entex's primary asserted reason for firing him – his failure to close sufficient tickets – was a pretext in that the standard was not uniformly applied to other employees. In addition, Connolly produced evidence that Entex's management

refused to enter into the interactive process in order to find an accommodation that would be reasonable and effective. The evidence which Connolly submitted should be sufficient to raise an issue of fact on each prima facie element of his claim and on the issues of whether Entex's reasons were pretext, and on the ultimate question of discrimination.

This Court should grant Connolly's petition in order to address this issue of allocation of burden of proof in an ADA claim and to determine how a claimant's right to reasonable accommodation and the notion of the interactive process affect the claimant's burden of proof.

3. The Ninth Circuit failed to follow the precedent of the Oregon Supreme Court on what is required to withstand summary judgment on a claim under Oregon's Statutes, instead applying federal standards.

The Oregon Supreme Court has determined that a person claiming discrimination in a state claim need only present evidence to raise an issue of fact on the claimant's prima facie case in order to withstand a motion for summary judgment. The Court implicitly rejected the *McDonnell Douglas* analysis in *City of Portland v. Bureau of Labor and Industries*, 298 Or. 104, 690 P.2d 475 (1984), when it considered the possibility of shifting burdens of proof in the employment context. The Bureau had made a factual finding in favor of an employee on a gender discrimination claim. The Supreme Court considered the issue on review. The City took the position that the Bureau's determination could not be upheld because the City had adduced evidence of a non-discriminatory motivation which was uncontroverted. The City also argued that it could overcome the permissible inference of

a discriminatory motive only by establishing an affirmative defense.

The Supreme Court rejected both of those premises and determined that the burden of proof to establish a prima facie case remained on the plaintiff without shifting to the defendant:

> One who merely establishes a prima facie case and rests does not necessarily win even if the opponent adduces no evidence whatsoever and merely relies on a denial of alleged wrongdoing. The trier of fact may, in such instance, decline to draw the permissible inference necessary to establish liability. Indeed, the trier of fact may disbelieve the evidence adduced to establish the fact from which the inferred fact is to be drawn. In either case, the party with the burden of persuasion would lose. On the other hand, were the trier of fact to believe the evidence adduced to prove the primary fact and then draw a permissible inference that establishes the charge, an employer who rests will lose.

Id. at 114-15. The elements of a prima facie case under the Oregon Statutes should be the same as they are under the ADA because Or. Rev. Stat. § 659.449 provides that the Oregon Statutes "shall be construed to the extent possible" with similar provisions of the ADA.

The Ninth Circuit has followed the Oregon Supreme Court's direction on some occasions. See, e.g., *Messick v. Horizon Industries Inc.*, 62 F.3d 1227 (9th Cir. 1995). On other occasions, the Ninth Circuit has not followed that

direction. See, e.g., *Snead v. Metropolitan Property & Casualty Ins. Co.*, 237 F.3d 1080 (9th Cir. 2001).

When faced with a motion for summary judgment, therefore, a claimant would need only to raise an issue of fact as to each element of the prima facie case. There would be no shifting of the burden of proof. Connolly's claims under the Oregon statutes were filed under the federal court's supplemental jurisdiction. Therefore, the court should apply state substantive law and federal procedural law, as it would in a case brought under diversity jurisdiction. Determining what is substantive law is, as this Court has noted, "sometimes a challenging endeavor." *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 427 (1996). In that case, this Court set forth the following standards for determining whether a law is substantive or procedural:

> *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945), an early interpretation of *Erie*, propounded an "outcome-determination" test: "[D]oes it significantly affect the result of a litigation for a federal court to disregard a law of a State that would be controlling in an action upon the same claim by the same parties in a State court?" . . . A later pathmarking case, qualifying *Guaranty Trust*, explained that the "outcome-determination" test must not be applied mechanically to sweep in all manner of variations; instead, its application must be guided by "the twin aims of the *Erie* rule: discouragement of forumshopping and avoidance of inequitable administration of the laws." *Hanna v. Plumer*, 380 U.S. 460, 468 (1965).

Gasperini, 518 U.S. at 427-28.

In this case, the difference is outcome determinative because there is no shifting of the burden of proof. Therefore, Connolly would have prevailed in the motion for summary judgment only by raising an issue of fact as to each element of his claim under the Oregon Statutes.

The District Court and the Ninth Circuit failed to follow the precedent of Oregon's Supreme Court in deciding Entex's summary judgment motion under the Oregon Statutes. This Court should grant Connolly petition to determine whether the federal burden shifting should be applied in federal courts to claims of discrimination against disabled workers under state statutes.

CONCLUSION

This Court should grant Connolly's petition to review these important questions under the ADA and Oregon's Statutes.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

JOSEPH A. CONNOLLY, III, Plaintiff, v. ENTEX INFORMATION SERVICES, INC., Defendant.	Civil No. 99-82-KI OPINION

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KING, Judge:

Plaintiff Joseph A. Connolly brought this action against defendant Entex Information Services, Inc. (Entex"), for disability discrimination under the Americans with Disabilities Act, 42 U.S.C. § 12101 et. seq. (The "ADA") and the Oregon counterpart, ORS 659.436. Connolly claims that he is a qualified individual with a disability and that he was discharged from his position as a Senior Customer Engineer because of his disability. Entex admits that Connolly is disabled but denies that he is a qualified individual with a disability or that he was discharged because of his disability. Before the court is Entex's motion for summary judgment (#37). For the reasons set forth below, I grant Entex's motion.

FACTS

Connolly suffers from severe Attention Deficit Disorder ("ADD"), Attention Deficit with Hyperactivity Disorder ("ADHD"), depression, and Asperger's Syndrome (a form of autism).

On September 28, 1996, Entex hired Connolly as a Senior Customer Engineer in its Intel Division. Entex's Intel Division provides computer maintenance and repair services at six Intel Corporation campuses in Oregon.

At the time of his hire, Connolly did not inform Entex of any disabling condition. On his first day of

employment, he checked the "individual with a disability" box on an Affirmative Action form that he submitted to Entex, but he did not provide any information concerning his condition and he did not request any accommodation.

Connolly first worked on Entex's "WinWin" night migration team, transferring data on Intel users' computers and performing related tasks. For approximately two weeks, he also performed WinWin Work Group Analysis on the day shift, which surveyed Intel users' computer operating environments.

In late January 1997, at Connolly's request, he transferred to a Desktop Support position where he was responsible for repairing computer-related problems and assisting Intel users. Intel paid Entex for Desktop Support services based on the number of work orders or "tickets" that Entex closed.[1] Entex's compensation was reduced if it had more than 5% "missed commits," i.e., tickets not closed within the prescribed time.

In March 1997, Connolly's supervisor, Loren Lott, counseled him as to attention and follow-through problems. Connolly did not disagree with Lott's criticisms, but responded that he had ADD, that he suspected that his medication was not working, and that he would see his doctor.

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[1]Entex asserts that all Desktop Support technicians, including Connolly, were expected to close 18 to 20 tickets per week and to close each ticket within a designated time. Connolly contests whether Entex required each Desktop Support technician to close 18 to 20 tickets per week. Nonetheless, Connolly does not appear to contest Entex's assertion that he failed to close a sufficient number of tickets per week to perform adequately his job.

On April 4, 1997, then Campus Manager Russ Pierce (Lott's supervisor) advised Connolly that his productivity level was unacceptably low. Pierce later informed Connolly that he needed to carry his share of the workload, to follow directions from his Lead Technician and his supervisor without "wandering off" on his own, to effect a "major improvement," and to take a leave of absence if necessary. In his deposition, Connolly testified that he agreed at the time that a major improvement was needed. He elected not to take a leave of absence.

Although the factual record is not entirely clear,[2] it appears that Entex invoked its progressive disciplinary process in late May 1997. On June 24, 1997, Connolly's supervisors met with him and gave him a "Letter of Concern," that set forth the deficiencies in Connolly's work performance (e.g., failing to resolve as few as four tickets a day, failing to follow proper ticket handling and documentation processes) and needed improvements in his work performance.

The day after he received the Letter of Concern, Connolly proposed to the Lead Technician for his team, Terry Schmidt, that Connolly be allowed to transfer to a new position. In early July 1997, Entex proposed to Connolly that he be transferred within the Intel Division to the WinWin team doing Work Group Analysis. Connolly interviewed for the position and it was offered to him on July 9, 1997. Connolly rejected the transfer offer because

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[2]Contrary to Local Rule 56.1(b), Connolly made only a general objection to the majority of the statements of fact contained in Entex's concise statement.

he viewed the new job as "monotonous" and "redundant."[3] On the same day he received the transfer offer, he wrote an e-mail to management that stated that he would provide them with a detailed "plan of attack" for working his way up to an acceptable level of productivity.

On July 17, 1997, Jim Reavis, a clinical social worker who was Connolly's therapist, asked Entex if he could perform an on-site analysis to see whether an accommodation for Connolly could be identified. Entex ultimately declined Reavis' offer.

On July 21, 1997, Connolly personally proposed an eight-week "Intensive Task Recovery Plan" that set productivity requirements in terms of tickets to be closed per week. Entex agreed to implement the plan on a four-week basis, but made some changes to Connolly's proposal. Specifically, while Entex accepted Connolly's productivity targets for the first and second weeks of the plan (10 and 12 tickets per week, respectively), it modified the proposed targets for the third and fourth weeks (to 15

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[3]In an affidavit signed in February 2000, Connolly states that, prior to interviewing for the WinWin team position, he informed Jace Vaught, a later Campus Manager, that the WinWin position would not be suitable for his disability because it involved much organization and record-keeping, which he states are areas of weakness due to his disability. Connolly also states that, at the time of the interview, he was concerned because the WinWin team position was temporary in a sense that the Desktop Support positions were not. Connolly Aff., ¶¶ 37-38 (Brischetto Aff., Exh F).

and 18-20 tickets per week, respectively).[4] Subsequently, Connolly failed to meet the productivity requirements of the plan for the first, second and third weeks.

On July 25, 1997, Entex management presented Connolly with a written Final Warning that outlined his more recent performance deficiencies. The document warned Connolly that the next incident of unacceptable performance would result in further corrective counseling, including separation from Entex. Due to continuing performance problems, including Connolly's failure to meet the productivity requirements of the modified Intensive Task Recovery Plan, he was discharged on August 14, 1997.

After his employment with Entex and one other company (from which he was also terminated due to performance problems), Connolly filed a claim for disability benefits with the Social Security Administration. Ultimately, the Social Security Administration declared him totally disabled and unable to work as of August 14, 1997 – his last day of work at Entex.

LEGAL STANDARDS

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c). The initial burden is on the moving party to point out the absence of any genuine issue of material fact. Once

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[4]I note that the modified productivity requirement for the third week (minimum 15 per week) was only slightly different from Connolly's proposal for the third week (minimum 12; maximum 15).

the initial burden is satisfied, the burden shifts to the opponent to demonstrate through the production of probative evidence that there remains an issue of fact to be tried. Celotex Corp. v. Catrett, 477 U.S. 317, 323-24, 106 S. Ct. 2548, 2552-53 (1986). A scintilla of evidence, or evidence that is merely colorable or not significantly probative, does not present a genuine issue of material fact. United Steelworkers of Am. v. Phelps Dodge Corp., 865 F.2d 1539, 1542 (9th Cir.), cert. denied, 493 U.S. 809 (1989).

DISCUSSION

To prevail on his claim of disability discrimination under the ADA, Connolly must establish that (1) he has a disability; (2) he is a qualified individual with a disability, i.e., that with or without reasonable accommodation, he is capable of performing the essential functions of the job; and(3) he was terminated because of his disability. Bradley v. Harcourt, Brace and Co., 104 F3d 267, 271 (9th Cir. 1996) (citing Kennedy v. Applause, Inc., 90 F.3d 1477, 1481 (9th Cir. 1996)). Connolly must make a similar showing to prevail under his disability discrimination claim brought under Oregon law. Most relevant to the motion before the court is Connolly's ability to establish that he is a qualified individual with a disability.

To come within the protection of both the ADA and ORS 659.436, Connolly must be qualified to perform his former position as a Senior Customer Engineer. Under the ADA, a qualified individual is "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). See also OAR 839-006-0205(4) ("An 'otherwise qualified disabled person' is an individual with a disability who

satisfies the requisite skill, experience, education or other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position.").

Connolly does not dispute that he did not perform satisfactorily the essential functions of his Desktop Support position at Entex. Instead, he argues that, if he had been given a reasonable accommodation by Entex, he would have been able to perform satisfactorily. When an ADA claim is based on an employer's alleged refusal to make a reasonable accommodation, the plaintiff bears the burden of producing evidence that "a specific, reasonable accommodation was available to the defendant at the time plaintiff's limitations became known." Willis v. Pacific Maritime Association, 162 F3d 561, 565 (9th Cir. 1998) (quoting Barnett v. U.S. Air, Inc., 157 F3d 744, 748 (9th Cir. 1998)).

I first examine the accommodations that have been identified by Connolly. In his amended concise statement of facts, Connolly points to affidavits from his therapist (Reavis) and physician (George A. Keepers, M.D.), to support the allegation that accommodations were in existence that would have enabled him to meet Entex's standards. Those affidavits, however, do not identify or describe any concrete accommodations that would allow Connolly to perform in his Desktop support position. The affidavits, at best, express a belief that accommodations could have been designed. As such, Connolly's case rests on the only other documentary evidence that he has submitted to demonstrate a specific, reasonable accommodation. That evidence is a report from a psychiatrist, E. Gene Stubbs, M.D., dated December 19, 1999.

The relevant portion of Dr. Stubbs' report reads as follows:

> I believe the following accommodations could have helped Mr. Connolly be successful in applying his talents to the job, while overcoming his deficits due to his disabilities: 1) providing structure, for example, assigning Mr. Connolly one job at a time, with an estimate of how long the supervisor would estimate it would take him to finish, and to have Mr. Connolly set his alarm watch to go off every 30 minutes. 2) To assign a co-staff to work alongside Mr. Connolly, so that the co-staff could cue Mr. Connolly when Mr. Connolly got distracted, or was getting too wordy with a customer. 3) To give him a set of written rules which would be posted at his worksite informing him of the steps required to leave early to see his doctor or pick up medication. He could be reminded of how much sick time or personal time that he has left, and how much he has used. 4) To assign him an advocate either from inside the company or outside the company who could attend meetings with his supervisors, who could serve as an advocate for Mr. Connolly, serve as a spokesperson, could serve as an extra pair of eyes and ears to provide feedback to Mr. Connolly so that he doesn't shut down when he is feeling overwhelmed, could serve as someone to whom he could vent when he was feeling stressed, and could help him problem-solve difficult situations. 4) To provide visual strategies, verbal cues and feedback, and auditory signals to help provide necessary cues to help Mr. Connolly complete his work in a timely and thorough manner. 5) To assign a clerical staff to assist Mr. Connolly with his paper work and documentation. For example, after each job, this

> person could review the paperwork with Mr. Connolly to ensure that it is complete.

Brischetto Affidavit, Exh. B, pp. 1-2.

At the outset, I am reluctant to endorse, as a reasonable accommodation, the hiring of a "shadow" employee to ensure that another employee performs his essential job functions. Connolly also provides no precedent in support of such an argument. As to Dr. Stubbs' other suggested accommodations, only the first and fourth provide a feasible mechanism to increase Connolly's productivity (i.e., closing of tickets). I find that the vagueness of the suggestions, combined with evidence that Entex did provide the type of assistance suggested, precludes this evidence from defeating summary judgment. For instance, it appears to be undisputed that Entex reduced Connolly's tickets to two at a time (instead of four or five) and gave Connolly paper print-outs of his tickets and trouble-shooting tips. Likewise, Entex gave Connolly a checklist to help him remember ticket handling procedures.

In short, Connolly has not shown that he would have been able to perform the essential functions of the Desktop Support position even with an accommodation designed to allow him to perform that job. For the purposes of this opinion, however, I do not find that such a deficiency is sufficient for summary judgment. Instead, I will assume that in a situation in which an employee cannot perform the essential functions of his current position with a reasonable accommodation, the ADA requires the employer to offer a reassignment of the employee to a position that he can perform. See Smith v. Midland Brake, Inc., 180 F3d 1154, 1169. (10th Cir. 1999) ("If no reasonable accommodation can keep the employer in

his or her existing job, then the reasonable accommodation may require reassignment to a vacant position so long as the employee is qualified for the job and it does not impose an undue burden on the employer.") Nonetheless, because Entex did make such an offer to Connolly, and he refused the reassignment, summary judgment is appropriate. Id. At 1177 ("[T]he employer is free to choose the reassignment that is to be offered to the qualified individual with a disability. If the disabled individual rejects that reassignment, the employer is under no obligation to continue offering other reassignments.").

As stated in the facts set forth above, Entex offered to reassign Connolly back to the WinWin team doing Work Group Analysis. The record reflects that, prior to Connolly transferring to the Desktop Support position, he successfully performed Work Group Analysis for two weeks as part of the WinWin team. The reassignment was a reasonable accommodation in light of the fact Connolly would have remained a Senior Customer Engineer and apparently received the same pay. I am not convinced that Connolly would have had less job security at the WinWin job (due to the temporary nature of the work) than if he had remained in a Desktop Support position or that such a factor would prevent the proposed reassignment from qualifying as a reasonable accommodation.

Because Connolly (1) has failed to identify any reasonable accommodation that would have allowed him to perform the essential functions of a Senior Customer Engineer in a Desktop Support position, and (2) opted not to take the reassignment to the WinWin position offered by Entex, he is not a qualified individual with a disability under the ADA or Oregon law and summary judgment is

appropriate.[5]

The case for summary judgment is further strengthened by Connolly's failure to reconcile adequately the apparent inconsistency between his representation of total disability to the Social Security Administration and his claim in this lawsuit that he was, in fact, capable of working for Entex as a Senior Customer Engineer.

In Cleveland v. Policy Management Systems Corp., __ U.S. __ 119 S. Ct. 1597 (1999), the Supreme Court held that an ADA plaintiff cannot ignore the apparent contradiction that arises out of an earlier SSDI total disability claim and, instead, must proffer a sufficient explanation:

> When faced with a plaintiff's previous sworn statement asserting "total disability" or the like, the court should require an explanation of any apparent inconsistency with the necessary elements of an ADA claim. To defeat summary judgment, that explanation must be sufficient to warrant a reasonable juror[] concluding that, assuming the truth of, or the plaintiff's good faith belief in, the earlier statement, the plaintiff could nonetheless "perform the essential functions" or her job, with or without "reasonable accommodation."

Cleveland, 119 S. Ct. at 1604.

The most apparent inconsistency in Connolly's case is the fact that he was found to be disabled as of the last

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[5]Because I find that Connolly is not a qualified individual with a disability, I do not reach the issue of whether he was fired because of his disability.

day of his employment at Entex, yet Connolly argues that he was able to perform, with reasonable accommodation, the essential functions of his Desktop Support position as of that time. He attempts to explain away this inconsistency by arguing that the way in which he was supervised and treated at Entex, after his poor work performance became evident, caused his ability to work to deteriorate. Plaintiff's Opposition Brief, pp. 13, 15. The problem with this argument is, of course, that he had already demonstrated an inability to perform the essential functions of the Desktop Support position before he was subject to any disciplinary actions by Entex management.

I am reluctant to find that the standard set forth in Cleveland, when applied to this case, provides an independent basis for summary judgment. This is due to the fact that the record is not clear in regard to the representations that Connolly made to the SSA about the onset of his inability to work. Nonetheless, when viewed in the light of the other fatal flaws in Connolly's argument that he is a qualified individual with a disability, an application of the Cleveland standard provides further support for summary judgment in this case.

CONCLUSION

Based on the foregoing, the motion for summary judgment (#37) by Entex Information Services, Inc., is GRANTED.

DATED this 19th day of May 2000.

Garr M. King

GARR M. KING
United States District Court Judge

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

JOSEPH A. CONNOLLY, III, Plaintiff, v. ENTEX INFORMATION SERVICES, INC., Defendant.	Civil No. 99-82-KI ORDER

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KING, Judge:

The motion for summary judgment (#37) by Entexx Information Services, Inc., is GRANTED.

IT IS SO ORDERED.

DATED this 19th day of May, 2000.

Garr M. King
GARR M. KING
United States District Court Judge

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DEC 13 2001

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSEPH CONNOLLY, III,	) No. 00-35534
Plaintiff-Appellant	) D.C. No. CV 99-00082-GMK
v.	)
	) MEMORANDUM*
ENTEX INFORMATION SERVICES, INC., a Delaware Corporation	)
Defendant-Appellee	)

Appeal from the United States District Court
for the District of Oregon
Garr M. King, District Court Judge, Presiding

Argued and Submitted May 10, 2001
Portland, Oregon

Before: GOODWIN, GREENBERG,** and RAWLINSON, Circuit Judges

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

**The Honorable Morton I. Greenberg, Senior United States Circuit Judge for the Third Circuit, sitting by designation.

Appellant Joseph A. Connolly III ("Connolly") appeals the district court's grant of summary judgment to Entex Information Services, Inc. ("Entex") in Connolly's disability discrimination action brought pursuant to the Americans with Disabilities Act, 42 U.S. C. § 12101 et seq. ("ADA") and Oregon Revised Statutes § 659.436. Connolly alleged that Entex discharged him from his position as Senior Customer Engineer because of his disability, which consisted of Attention Deficit Disorder ("ADD"), Attention Deficit Hyperactivity Disorder ("ADHD"), depression, and Asperger's Syndrome, a form of autism. Entex countered that Connolly was terminated for low productivity after numerous warnings and his refusal to transfer to a different job that Entex offered. We affirm the district court's grant of summary judgment in favor of Entex.

Connolly joined the Desktop Support team after performing successfully for the trial period of 120 days in another group, the WinWin team. While in the Desktop Support team, he had several conversations with managers regarding his performance and his failure to close the number of tickets required by the department (approximately 18-20 per week). He was warned that he had to improve his performance. When he pointed to his ADD and switching medications as a source of his problem, his manager suggested that he take a medical leave of absence. Connolly requested a transfer to a

"special projects" work group within Desktop Support that did not have a ticket count requirement, but Entex stated that the technicians assigned to that team were the best and most reliable since they functioned independently under a great deal of stress.

On July 9, 1997, Connolly was offered a transfer to the WinWin team doing work group analysis for the same pay and under the same title, but he considered the job as inappropriate for him and "monotonous." According to Entex, the WinWin Group was responsible for converting about 9,000 Intel computers from DOS to Windows NT, and the group performed "migration," a process of standardizing computers, and "analysis," which was surveying the current computer operating environments. Entex states that WinWin technicians did not have a productivity requirement and that the position was less demanding. Connolly felt that the job involved record-keeping and organization which were his areas of weakness and that the temporary nature of the job also made it more undesirable. He interviewed for the position on July 9, 1997, with Jason Bowman, who would be his supervisor and with whom he had worked earlier on the WinWin team with no problems. He was offered the job but turned it down.

Connolly argues that Entex failed to provide reasonable accommodation because it failed to enter the interactive process with him, but Connolly does not show that Entex did not make a good faith effort to provide a reasonable accommodation. Connolly contends that although he has the burden of production of each element of his prima facie case, he does not have the burden of demonstrating any specific reasonable accommodation because it was Entex's burden to enter into the interactive process which Connolly requested. However, according to

Connolly, although Entex management did not meet with him in person weekly as he requested, they did e-mail with him and speak with him regularly on the phone and meet with him several times, during which a discussion of reasonable accommodations occurred.

Entex offered Connolly a medical leave of absence; reduced the number of tickets assigned to him at one time to two tickets rather than four or five; printed out his tickets; instructed his supervisor to show him how to create reports from REX with information from the tickets; gave him a checklist and binder in which he could take notes and track pertinent data to aid in his record keeping difficulties; agreed to a modified intensive recovery program; and offered him another job in the WinWin group at the same pay and title. Therefore, Connolly did not show that Entex failed to make a good faith effort to assist him in seeking accommodation.

Connolly argues that he was not given the reassignment that he desired, but Entex was not required to give him the reassignment of his choice. *See Barnett v. U.S. Air, Inc.*, 228 F. 3d 1105, 1110 (9th Cir. 2001). The goal is to identify an accommodation that allows the employee to perform the job effectively, not to provide the job of the employee's choice. *See id.* Entex offered Connolly a job in the WinWin group where he had worked previously and performed adequately. Since Connolly had previously demonstrated that he could perform that job effectively, Entex satisfied its accommodation obligation by offering the WinWin position to Connolly.

Oregon Revised Statutes § 659.449 provides that Oregon law is to be construed consistently with the federal ADA. Since we have found that Entex did not violate the federal ADA, a similar finding follows as to Connolly's

claims under the Oregon statute.

AFFIRMED.

JUDGMENT
COSTS TAXED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 00-35534
CT/AG#: CV-99-00082-GMK

JOSEPH CONNOLLY, III

Plaintiff - Appellant

v.

ENTEX INFORMATION SERVICES INC., a Delaware Corporation

Defendant - Appellee

APPEAL FROM the United States District Court for the District of Oregon (Portland).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Oregon (Portland)
and was duly submitted.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered December 13, 2001

FILED
JAN 31 2002

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSEPH CONNOLLY, III,	) No. 00-35534
	)
Plaintiff-Appellant,	) D.C. No. CV 99-00082-GMK
v.	)
	) ORDER DENYING
ENTEX INFORMATION	) PETITION FOR
SERVICES, INC., a Delaware	) REHEARING
Corporation,	) EN BANC
	)
Defendant-Appellee	)

Appeal from the United States District Court
for the District of Oregon
Garr M. King, District Court Judge, Presiding

Argued and Submitted May 10, 2001
Portland, Oregon

Before: GOODWIN, GREENBERG,* and RAWLINSON, Circuit Judges.

The panel, as constituted above, has unanimously voted to deny the petition for rehearing en banc. Judge

Rawlinson so voted and Judges Goodwin and Greenberg so recommended.

The full court has been advised of the petition for rehearing en banc, and no active judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35(b).

Appellant's petition for rehearing en banc, filed January 3, 2002, is DENIED.

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*The Honorable Morton I. Greenberg, Senior Judge of the United States Court of Appeals for the Third Circuit, sitting by designation.

US CODE

Title 42, Chapter 126, Sec. 12101

Sec. 12101. - findings and purpose

(a) Findings

The Congress finds that -

(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation of lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;

(8) the nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(9) the continuing existence of unfair and unnecessary discrimination and prejudice denies

people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

(b) Purpose

It is the purpose of this chapter -

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

Title 42, Chapter 126, Sec. 12102

Sec. 12102. - Definitions

As used in this chapter:

(1) Auxiliary aids and services

The term "auxiliary aids and services" includes -

(A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;

(B) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;

(C) acquisition or modification of equipment or devices; and

(D) other similar services and actions.

(2) Disability

The term "disability" means, with respect to an individual -

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

(3) State

The term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.

Title 42, Chapter 126, Sec. 12111

Sec. 12111. - Definitions

As used in this subchapter:

(1) Commission

The term "commission means the Equal Employment Opportunity Commission established by section 2000e-4 of this title.

(2) Covered entity

The term "covered entity" means an employer, employment agency, labor organization, or joint labor-management committee.

(3) Direct threat

The term "direct threat" means a significant

risk to the health or safety of others that cannot be eliminated by reasonable accommodation.

(4) Employee

The term "employee" means an individual employed by an employer. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

(5) Employer

(A) In general

The term "employer" means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this subchapter, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.

(B) Exceptions

The term "employer" does not include -

(i) the United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or

(ii) a bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of title 26.

(6) Illegal use of drugs

(A) In general

The term "illegal use of drugs" means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act (21 U.S.C. 801 et seq.). Such term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provision of Federal law.

(B) Drugs

The term "drug" means a controlled substance, as defined in schedules I through V of section 202 of the Controlled substances Act (21 U.S.C. 812).

(7) Person, etc.

The terms "person", "labor organization", "employment agency", "commerce", and industry affecting commerce", shall have the same meaning given such terms in section 2000e of this title.

(8) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with our without reasonable accommodation,

can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

(9) Reasonable accommodation

The term "reasonable accommodation" may include -

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

(10)

(A) In general

The term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors set forth in

subparagraph (B).

(B) Factors to be considered

In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include -

(i) the nature and cost of the accommodation needed under this chapter;

(ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;

(iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

(iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

Title 42, Chapter 126, Sec. 12112

Sec. 12112. - Discrimination

(a) General rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or a discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) Construction

As used in subsection (a) of this section, the term "discriminate" includes -

(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);

(3) utilizing standards, criteria, or methods of administration -

(A) that have the effect of discrimination on the basis of disability; or

(B) that perpetuate the discrimination of others who are subject to common administrative control;

(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability or an individual with whom the qualified individual is known to have a relationship or association;

(5)

(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the

standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and

(7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

(c) Covered entities in foreign countries

(1) In general

It shall not be unlawful under this section for a covered entity to take any action that constitutes discrimination under this section with respect to an employee in a workplace in a foreign country if compliance with this section would cause such covered entity to violate the law of the foreign country in which such workplace is located.

(2) Control of corporation

(A) Presumption

If an employer controls a corporation whose place of incorporation is a foreign country, any

practice that constitutes discrimination under this section and is engaged in by such corporation shall be presumed to be engaged in by such employer.

(B) Exception

This section shall not apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer.

(C) Determination

For purposes of this paragraph, the determination of whether an employer controls a corporation shall be based on -

(i) the interrelation of operations;

(ii) the common management;

(iii) the centralized control of labor relations; and

(iv) the common ownership or financial control, of the employer and the corporation.

(d) Medical examinations and inquiries

(1) In general

The prohibition against discrimination as referred to in subsection (a) of this section shall include medical examinations and inquiries.

(2) Preemployment

(A) Prohibited examination or inquiry

Except as provided in paragraph (3), a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.

(B) Acceptable inquiry

A covered entity may make preemployment inquiries into the ability of an applicant to perform job-related functions.

(3) Employment Entrance examination

A covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the result of such examination, if -

(A) all entering employees are subjected to such an examination regardless of disability;

(B) information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except that -

(I) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary

accommodations;

(ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) government officials investigating compliance with this chapter shall be provided relevant information on request; and

(C) the results of such examination are used only in accordance with this subchapter.

(4) Examination and inquiry

(A) Prohibited examinations and inquiries

A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

(B) Acceptable examinations and inquiries

A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at the work site. A covered entity may make inquiries into the ability of an employee to perform job-related functions.

(C) Requirement

Information obtained under subparagraph (B) regarding the medical condition or history of any employee are subject to the requirements of subparagraphs (B) and (C) of paragraph (3).

Code of Federal Regulations, 29 CFR 1630.2

Sec. 1630.2 Definitions

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(m) Qualified individual with a disability means an individual with a disability who satisfied the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position.

***

(o) Reasonable accommodation.

(1) The term reasonable accommodation means:

(i) Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or

(ii) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or

(iii) Modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.

(2) Reasonable accommodation may include but is not limited to:

(i) Making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(ii) Job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities.

(3) To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.

As used in ORS...659.010 to 659.110 and 659.400 to 659.545, unless the context requires otherwise:

***

(14) "Unlawful employment practice" includes only those unlawful employment practices specified in ORS...659.400 to 659.494.

***

659.400. Definitions for ORS 659.400 to ORS 659.460

As used in ORS 659.400 to 659.460, unless the context requires otherwise:

(1) "Disabled person" means a person who has a physical or mental impairment which substantially limits one or more major life activities, has a record of such an impairment or is regarded as having such an impairment.

(2) As used in subsection (1) of this section:

(a) "Major life activity" includes, but is not limited to self-care, ambulation, communication, transportation, education, socialization, employment and ability to acquire, rent or maintain property.

(b) "Has a record of such an impairment" means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(c) "Is regarded as having such an impairment" means that the individual:

(A) Has a physical or mental impairment that does not substantially limit major life activities but is treated by an employer or supervisor as having such a limitation;

(B) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitude of others toward such impairment; or

(C) Has none of the impairments described in subparagraph (A) or (B) of this paragraph, but is treated by an employer or supervisor as having a mental or physical impairment that substantially limits one or more major life activities.

(d) "Substantially limits" means:

(A) The impairment renders the person unable to perform a major life activity that the average person in the general population can perform; or

(B) The impairment significantly restricts the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner or duration under which the average person in the general population can perform the same major life activity.

(3) "Drug" means a controlled substance, as classified in schedules I through V of section 202 of the Controlled Substances Act, 21 U.S.C.A. 812, as amended, and as modified under ORS 475.035.

(4) "Employer" means any person that employs six or more persons and includes the state, counties, cities, districts, authorities, public corporations and entities and their instrumentalities, except the Oregon National Guard.

(5) "Illegal use of drugs" means any use of drugs, the possession or distribution of which is unlawful under state law or under the Controlled Substances Act, 21 U.S.C.A. 812, as amended, but does not include the use of a drug taken under supervision of a licensed health care professional, or other uses authorized under the Controlled Substances Act or under other provisions of state or federal law.

ORS 659.405. Policy

(1) It is declared to be the public policy of Oregon to guarantee disabled persons the fullest possible participation in the social and economic life of the state, to engage in renumerative employment, to use and enjoy places of public accommodation, resort or amusement, and to secure housing accommodations of their choice, without discrimination.

(2) The right to otherwise lawful employment without discrimination because of disability where the reasonable demands of the position do not require such a distinction, and the right to use and enjoy places of public accommodation, resort or amusement, and to purchase or rental of property without discrimination because of disability, are hereby recognized and declared to be the rights of all the people of this state. It is hereby declared to be the policy of the State of Oregon to protect these rights and ORS 659.400 to 659.460 shall be construed to effectuate such policy.

ORS 659.436

659.436. Discrimination against disabled persons prohibited.

(1) It is an unlawful employment practice for any employer to refuse to hire, employ or promote, to bar or discharge from employment or to discriminate in compensation or in terms, conditions or privileges of employment because an otherwise qualified person is a disabled person.

(2) An employer violates subsection (1) of this section if the employer does any of the following:

(a) The employer limits, segregates or classifies a job applicant or employee in a way that adversely affects the opportunities or status of the applicant or employee because the applicant or employee is a disabled person.

(b) The employer participates in a contractual or other arrangement or relationship that has the effect of subjecting an otherwise qualified job applicant or employee who is a disabled person to the discrimination prohibited by ORS 659.536 to 659.449, including but not limited to participating in a relationship with an employment or referral agency, a labor union, an organization providing fringe benefits to an employee of the employer, or an organization providing training and apprenticeship programs.

(c) The employer utilizes standards, criteria or methods of administration that have the effect of discrimination on the basis of disability, or that perpetuate the discrimination of others who are subject to common administrative control.

(d) The employer excludes or otherwise denies equal jobs or benefits to an otherwise qualified person because the person is known to have a relationship or association with a disabled person.

(e) The employer does not make a reasonable accommodation to the known physical or mental person who is a job applicant or employee, unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of the business of the employer.

(f) The employer denies employment opportunities to a job applicant or employee who is an otherwise qualified disabled person, if the denial is based on the need of the employer to make reasonable accommodation to the physical or mental impairments of the employee or applicant.

(g) The employer uses qualification standards, employment tests or other selection criteria that screen out or tend to screen out a disabled person or a class of disabled persons unless the standard, test or other selection criterion, as used by the employer, is shown to be job-related for the position in question and is consistent with business necessity.

(h) The employer fails to select and administer tests relating to employment in the most effective manner to ensure that when the test is administered to a job applicant or employee who has a disability that impairs sensory, manual or speaking skills, the test results accurately reflect the skills, aptitude or other characteristics of the applicant or employee that the test purports to measure, rather than reflecting the impaired sensory, manual or speaking skills of the employee or applicant. The provisions of this

paragraph do not limit the ability of an employer to select or administer tests designed to measure sensory, manual or speaking skills of an employee or job applicant.

ORS 659.437

659.437. Qualifications for position.

For the purposes of ORS 659.436, a disabled person is otherwise qualified for a position if the person, with or without reasonable accommodation, can perform the essential functions of the position. For the purpose of determining the essential functions of the position, due consideration shall be given to the employer's determination as to the essential functions of a position. If an employer has prepared a written description before advertising or interviewing applicants for a job, the position description shall be considered evidence of the essential functions of the job.

ORS 659.439

659.349. Reasonable accommodation.

(1) For the purposes of ORS 659.436, reasonable accommodation of an otherwise qualified disabled person may include:

(a) Making existing facilities used by employees readily accessible to and usable by disabled persons.

(b) Job restructuring, part-time or modified work schedules or reassignment to a vacant position.

(c) Acquisition or modification of equipment or devices.

(d) Appropriate adjustment or modification of examinations, training materials or policies.

(e) The provision of qualified readers or interpreters.

(2) Notwithstanding any other provision of ORS 659.400 to 659.460, an employer may not be found to have engaged in an unlawful employment practice solely because the employer fails to provide reasonable accommodation to a person with a disability arising out of transsexualism.

[Codified 1999]